

# Detained Without Charge: Eleven Yemenis Leave Guantánamo

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Theme: [Law and Justice](#)

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*On January 6, the Pentagon [announced](#) that it had “resettled” 11 Yemeni men to Oman after detaining them over two decades without charge at the US naval facility of Guantánamo Bay. Notice of this repatriation was given back on September 15, 2023 to Congress by Secretary of Defense Austin. Their removal from a facility made notorious in the aftermath of the September 11, 2001 attacks on the United States brings the number of those still detained at Guantánamo to 15.*

They are reminders about what the German jurist and Nazi enthusiast Carl Schmitt called a state of exception, a rather sinister way of saying that states, and leaders, can behave abominably if their position enables them to do so. The exercise of such a power is intended for the broader public good, a concept suitably rubbery to justify any assortment of crimes. The exception to observing laws, in other words, lies in the very nature of sovereignty itself. If you are not a sovereign, follow; if you are one, dictate and, if necessary, transcend and revise.

The circularity of the position provides little comfort for adherents of the rule of law: the leader can be found in a web of statutes, but if the leader is truly sovereign, exceptions can be made to them and, importantly, by them. In practice, we saw this principle used by former UK Prime Minister Boris Johnson with relish, though it brought him to a sticky end. It was cherished with pathological mania by President Richard Nixon, who likewise fell on that sword of presumption.

During the dark, dingy period known as the Global War on Terror, a slew of US officials thought the executive capable of not merely operating beyond the constraints of international law but, in some cases, domestic laws when national security demanded it. The Geneva Conventions were deemed inadmissible to terrorist suspects and Afghanistan’s Taliban fighters. The sting out that great anathema against the rule of law, indefinite detention without charge, was removed.

In 2007, two such officials, Richard J. Delahunty and John Yoo, [reasoned](#) that the US President was not bound by international protocols that could not aspire to the status of federal law. To so limit the office would run counter to the Constitution and raise international law to such a status that it “would transfer lawmaking authority to a vague, indeterminate process that is not subject to popular sovereignty.”

The detainees that filled the cells of the naval facility were a motley crew. Many had not been directly captured by US forces but bought for bounties in impoverished areas of the world where US\$5,000 goes far. As early as December 2002, Guantánamo’s operational commander **Maj. Gen. Michael E. Dunlavey** [was complaining](#) that he was being furnished

with “Mickey Mouse” detainees. An intelligence officer [was also quoted](#) in the *Los Angeles Times* as lamenting that, while “There are a lot of guilty [people] in there” there were also “a lot of farmers” in the mix.

Over time, many of the detainees were routinely tortured, force-fed, and denied the rudiments of due process. A number, such as **Mohammed El Gharani**, were children. By 2019, the Pentagon [began planning](#) for the death of the incarcerated suspects, drafting plans to build a hospice wing. The US Imperium, even as it stomped on the human rights of the terrorist suspects, was playing nurse awaiting imminent death, a nasty aspect of what has [come to be described](#) as “militarised care”.

Between February and May 2023, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, **Fionnuala Ní Aoláin**, [visited](#) the naval station. The “technical visit” involved meeting victims, survivors and families of the 9/11 attacks, relevant military and civilian personnel, detainees categorised as “high value” and “non-high value”, lawyers, human rights groups, former detainees now resettled, along with their families, and government personnel of other countries.

The June 2023 [report](#) on the visit was amply gloomy. Ní Aoláin acknowledged that the bulk of those sent to the facility “were brought without cause and had no relationship whatsoever with the events that took place on 9/11.” The rapporteur was also told by both detainees former and current that “she had arrived ‘too late’.”

The report noted a continued sense of “arbitrariness” pervading “the entirety of the Guantánamo detention of infrastructure – rendering detainees vulnerable to human rights abuse and contributing to conditions, or circumstances that lead to arbitrary detention.” Several procedures of the US government further established “a structural deprivation and non-fulfilment of human rights necessary for a humane and dignified existence and constitute at a minimum, cruel, inhuman, and degrading treatment across all detention practices at Guantánamo Bay.”

The rationale for transferring the 11 men has little to do with rights and liberties but much to do with clotting bureaucracy and procedure, shaped by security considerations and the interminable debate on closing the facility. **Tawfiq Nasir Awad Al-Bihani**, for instance, was found eligible for transfer by Executive Order 13492, “Review of Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities.” The other 10 were deemed eligible for transfer under the Periodic Review Board Process created by Executive Order 13567, “Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization of the Use of Military Force.”

The nature of such transfers and repatriations to third countries has also been shown to be sketchy and bleak, though the UN Rapporteur [did note](#) “some positive evidence of international law and human rights-compliant practice”. In the main, however, US officials rarely show interest in what happens to former detainees, least of all that quaint notion of rehabilitation. Shoddy diplomatic assurances that no ill-treatment will come to them are deemed sufficient. Some have been re-imprisoned and tortured. Others have lacked urgent ongoing medical care arising from their time in captivity. Many never consented to their transfer to the country in question.

Of those left, the Pentagon tells us that three are eligible for transfer, the same number eligible for assessment by the Periodic Review Board, seven still engaged in the tormenting military commission process and two convicted and sentenced by those commissions. That this is still the case is a travesty that goes to show that power does not only corrupt its holders but can treat basic assumptions of justice as needless luxuries. The odious practices at Guantánamo show that the line between the rule of law and the rule of the lawless is foggily cruel.

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